Mots claims that he looked for traffic at the intersection before entering, and that the intersection was "clear" before he entered. The term "clear" is a reference to making sure that an intersection is safe to proceed through; it means that the intersection has been looked at carefully in all directions to confirm that it is safe to proceed before entering. Mots further claims that he did not see the decedent's vehicle until a moment before the impact, and even then only as a "blur". However, eyewitness Kenneth Lee – who was stopped on westbound Central facing the same red light at 18th Street as Mots' rig went around him into the intersection – was able to see the decedent's vehicle as it approached and entered the intersection on southbound 18th Street.

Plaintiffs' emergency response expert, Robert Strong, opined that Mots' operation of his rig on the day in question reflected deliberate indifference to safety in that Mots drove too fast, failed to come to a complete stop, and failed to adequately assess the intersection before entering. Strong explained his deliberate indifference opinion as follows:

> What it means to me is that the operator of that emergency vehicle had time to properly rationalize, go through the thought process of what he is going to do in that emergency vehicle, that he had time to think about his decisions. * * *
> Mr. Mots had time to think about all his actions that occurred prior to and up to the time of the collision.
>
> * * *

> What it means to me to be deliberately indifferent, in regards to how I used it in this context, is that an individual has the ability to think about his actions that are about to occur prior to them occurring. He has a choice of whether or not to do one action or another, and in this regard, in regards to deliberate indifference, that means that he has made a conscious decision to do something that goes against the well-being and safety of the public.
>
> [H]e had a long time to react prior to ever reaching the intersection.

UG training materials explain that emergency vehicle operators face civil and criminal liability for irresponsible driving. Eyewitness Kenneth Lee testified: "The fire truck driver in my opinion is guilty of vehicular homicide and negligence because he came through the intersection with no regard for public safety and he took a life when all he had to do was slow up and see what was coming through the intersection."

Petitioners sued respondents under the state law for wrongful death, and under federal law (42 U.S.C. § 1983) for violation of substantive due process. Based on the foregoing evidentiary record, the district court denied respondent's motions for summary judgment on petitioner's §1983 claims, including Mots' claim of qualified immunity. Specifically, the District Court held that Mots had an opportunity to deliberate before engaging in the challenged conduct, and that the evidence was sufficient to raise a triable issue as to whether Mots acted with deliberate indifference.

The district court's qualified immunity ruling provided the vehicle for an interlocutory appeal to the United Stated Court of Appeals for the Tenth Circuit, which reversed. The court of appeals adopted a bright-line rule requiring application of a purpose-to-cause-harm standard whenever "a bystander [is] hit by an emergency response vehicle in the process of responding to an emergency call." (App. at 12). Alternatively, in apparent *dictum*, the court held that, as a matter of law, Mots did not have an opportunity for actual deliberation so that, on the facts, a deliberate indifference standard could not apply.[1] Thus, the court concluded that Mots (and the UG) could not be liable for a violation of the decedent's Fourteenth Amendment substantive due process rights because there was no proof that Mots intended to harm the decedent. The court ordered dismissal of the §1983 claims accordingly.

[1] The court's understanding of the facts was erroneous. It is undisputed that the westbound fire rig impacted with the driver's side of the decedent's southbound automobile. Nevertheless, the court's decision incorrectly states that the decedent's vehicle was traveling eastbound into the intersection, and suggests that the collision was head-on. (App.at 3-4) There is no evidentiary basis for this proposition.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DECISION VIOLATES THE HOLDING OF, OR AT LEAST, THE GUIDING PRINCIPLES UNDERLYING, THIS COURT'S DECISION IN *COUNTY OF SACRAMENTO V. LEWIS*, AND IMPROPERLY RESOLVES TRIABLE ISSUES OF FACT AS A MATTER OF LAW, AND THEREBY REACHES AN ERRONEOUS RESULT.

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court established a bright-line rule of liability in the limited context of high-speed police pursuits, holding that only an officer's purpose to cause harm will "shock the conscience" under 42 U.S.C. §1983. The Court reached this conclusion after considering a deliberate-indifference standard. The Court rejected a deliberate-indifference standard after deciding that, in the unique context of high-speed police pursuits, an official does not have an opportunity for actual deliberation. Outside of that limited context, however, the Court held the determination of whether particular government conduct suffices to shock the conscience must be made on a case-by-case basis.

This Court went further, observing that the determination of whether conduct suffices to shock the conscience "necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them". *Id.* at 847. Quoting its own earlier precedent, the Court observed that such a determination is based on "fluid" concepts, and the Court cautioned against case-

specific determinations of substantive due process protection based on "a matter of rule". *Id.* at 850. The Court clearly held that "[a]sserted denial [of substantive due process] is to be tested by an appraisal of the totality of facts in a given case". *Id.* at 850.

In the instant case, the district court followed this Court's instructions in *Lewis* by analyzing the evidence to determine whether, in fact, Mots had an opportunity for actual deliberation such that a deliberate-indifference standard should apply. After a detailed analysis of the evidence, the district court concluded that Mots had an opportunity to deliberate upon his course of conduct and, therefore, that a deliberate-indifference standard should apply.

Notwithstanding that the district court's approach to the case was in strict compliance with the governing principles of this Court's decision in *Lewis*, the court of appeals described the district court's reasoning in this regard as "novel". Then, without demonstrated correlation to the actual circumstances involved in the case at bar – and apparently under a fundamental misperception that this ninety-degree broadside collision was really a head-on collision – the court of appeals concluded that a purpose-to-cause-harm standard applies whenever "a bystander [is] hit by an emergency response vehicle in the process of responding to an emergency call". (App. at 12)[2]

---

[2] Petitioner is not suggesting that the court of appeals may have reached a different conclusion if it had correctly understood the facts. To the contrary, it seems clear that the court's holding was based on its *a priori* assessment that the particular facts of the case were irrelevant. The evidentiary inaccuracies in the court's decision may be merely a reflec-

(*Footnote continued*)

In this respect, the court of appeals misapprehended *Lewis*' focus on deliberation in determining the applicable culpability standard, and failed to comply with *Lewis*' requirement that such determination result from an exact analysis of the particular facts in each case. The court of appeals decision thus conflicts with *Lewis*, and reaches an erroneous result.

As indicated, the court of appeal's failure to engage in a detailed analysis of the facts *in this case* allowed it to reach conclusions unsupported in the evidentiary record. For example, the appellate decision states:

> A firefighter responding to a house fire has no time to pause. He has no time to engage in calm, reflective deliberation in deciding how to respond to an emergency call. Doing so would risk lives. This case presents a paradigmatic example of a decision that must be made in haste and under pressure.

(App. at 9) These abstract observations about fire response stand in stark contrast, however, to the evidence in this case. Here, Mots admitted that he had an opportunity to deliberate. He testified that he knew where he was going and how he was going to get there; that he had the ability to control his speed, and to decide upon a speed that he felt was appropriate at any given time, and to ensure that he had time to react; that his operation of the rig was part of a thought-out course reflecting the decisions that he made; that he had an adequate oppor-

---

tion of the court's choice of a sweeping, bright-line holding that is not dependent of the facts.

tunity to appraise the intersection in question, including the traffic and traffic lights, and to decide how he was going to handle the intersection; and that the way in which he attempted to handle the intersection was in accordance with the decisions that he had made.

The disparity between the court of appeals' conclusions and the actual evidentiary record seems to derive from the court's apparent perception that all emergency-vehicle response officials face similar challenges, so that the policies that led this Court to draw a bright line for police pursuits in *Lewis* should apply equally in other emergency response contexts, regardless of the actual facts. The court of appeals' inference in this regard is unsupported and, in fact, counter-intuitive.

Unlike a high-speed police pursuit (*i.e., Lewis*), the nature of fire response generally permits an opportunity for deliberation. In a pursuit, the officer must follow the route of his suspect; in fire response, the driver *chooses* the route. In a pursuit, the officer must drive at high speed, and often in a risky manner, or lose sight of the suspect with the pursuit ending in failure; in fire response, the driver *chooses* his speed and *decides* upon the level of risk *he* will create. In a pursuit, circumstances beyond the officer's control may leave him with no opportunity to apprehend, or react to, the danger caused by the sudden and unexpected actions of the fleeing suspect; in fire response, the circumstances are within the *driver's control* because *he* is in control of the route, speed and risk. Of course, that is exactly what Mots himself testified to in this case; that *he* chose the route, the speed and the level of risk that *he* would create.

Stated differently, it may be said that police pursuit is an activity defined by the officer's *reactions*, whereas fire response is an activity defined by the official's *actions*. Certainly, the reactive nature of a high-speed police pursuit factored heavily into this Court's analysis in *Lewis*. The decision references "unforeseen circumstances" in "rapidly evolving" situations, that "force" police officers to make "split-second judgments". *Id.* at 853. Focusing on the particular facts in the case before it, this Court observed, "Willard's outrageous behavior was practically instantaneous, and so was Smith's instinctive response". *Id.* at 855. Summing up the relevant facts, the Court observed:

> Smith was faced with a course of *lawless behavior for which the police were not to blame. They had done nothing to cause Willard's high-speed driving in the first place*, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes.

Id. at 855 (emphasis added). In speaking of the defendant's conduct, this Court specifically used the terms "reaction" and "response". *Id.*

The same cannot be said of fire rig operation in general, or the conduct of Mots in particular. Mots was not reacting when he chose his route that would take him through an obviously dangerous intersection. He was not reacting when he chose to drive at high speed into and through that intersection, in the oncoming lane

of traffic, against a red light. He was not reacting when he chose to enter that intersection without first ensuring that it was clear, ignoring that which was plain to an eyewitness stopped at that same red light. These were not reactions. These were Mots' *actions*; his *decisions*; and they were *deliberate*. The policy considerations underlying *Lewis'* bright-line intent-to-harm standard do not extend to such deliberate action.

Another policy consideration present in high-speed police pursuits, but absent in emergency fire response, is the dangerous message that a lesser, deliberate-indifference culpability standard might send to fleeing suspects. Writing for the majority in *Lewis*, Justice Souter referred to the pursuing police officer's "need to stop a suspect and show that flight from the law is no way to freedom". *Lewis*, 523 U.S. 853. In his concurrence, Justice Kennedy (joined by Justice O'Connor) reiterated this policy consideration:

> There is real danger in announcing a rule, or suggesting a principle, that in some cases a suspect is free to ignore a lawful police command to stop. No matter how narrow its formulation, any suggestion that suspects may ignore a lawful command to stop and then sue for damages sustained in an ensuing chase might cause suspects to flee more often, increasing accidents of the kind which occurred here.

Id. at 858. Dissimilarly, in the fire response context, holding officials liable for deliberately-indifferent conduct does not undermine the perception of official authority, enable criminal misconduct, or otherwise "send the wrong message".

None of these policy considerations that dictated the outcome in *Lewis* apply in the fire response context, but the appellate decision abstractly imposed them on all emergency vehicle response cases anyway. In so doing, the appellate holding unnecessarily conferred broad-based immunity upon firefighters and other government officials to act with deliberate indifference to the Constitutional rights of others. The appellate decision thus conflicts with *Lewis*.

Furthermore, applied to the case at bar, the court of appeals' abstract conclusion – offered in apparent *dictum* – that as a matter of law, emergency vehicle operators do not have an opportunity for deliberation, leads to an absurd result wherein Mots says he had an opportunity to deliberate and that, in fact, he did deliberate, but the court of appeals says Mots is wrong. So, an issue of fact, admitted by the defendant, has been transformed into an issue of law, rejected by the court. In this way, the appellate decision improperly elevates form over substance, and reaches an erroneous result.

II. THIS COURT SHOULD REMEDY THE ERRONEOUS TREND AMONG THE CIRCUITS THAT IMPROPERLY APPLIES THE PURPOSE-TO-CAUSE-HARM STANDARD ENUNCIATED IN *COUNTY OF SACRAMENTO V. LEWIS* TO EMERGENCY VEHICLE RESPONSE CASES UNDER 42 U.S.C. §1983 THAT DO NOT INVOLVE HIGH-SPEED POLICE PURSUITS, AND IN WHICH THERE IS AN OPPORTUNITY

FOR ACTUAL DELIBERATION, AND SHOULD RESOLVE A SPLIT AMONG THE CIRCUITS REGARDING THE RELEVANCE OF DELIBERATION IN THE ANALYSIS.

In support of its conclusion that, regardless of the particular facts in a given case, a purpose-to-cause-harm standard applies in all § 1983 cases involving emergency vehicle response, the court of appeals relied on recent decisions from the Seventh and Eighth Circuits, which also held a bright-line, purpose-to-cause harm standard applicable in such cases. *See: Carter v. Simpson*, 328 F.3d 948 (7th Cir. 2003); and *Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005)(en banc). Although the reasoning of these courts actually conflict with one another, they are equally erroneous in their misunderstanding of this Court's decision in *Lewis*.

A. *Carter* And *Terrell* Are Not Persuasive

1. *Carter v. Simpson*

In *Carter*, a sheriff's deputy's vehicle collided with another motorist in an intersection. At the time of the collision, the deputy was responding to an emergency call, and he entered the intersection against a red light, at high speed. The district court granted summary judgment for the deputy on the plaintiff's state law and §1983 claims, and the plaintiff appealed. On appeal, the Seventh Circuit reversed and remanded on the state law claim, but affirmed on the §1983 claim.

On the state claim, the court noted that Illinois provides immunity to government officials for negligence, but not for willful and wanton misconduct, and so the court undertook to assess whether the evidence

raised a triable issue on the willful and wanton claim. The court began by observing that, in Illinois, conduct is willful and wanton if it "shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others." *Carter*, 328 F.3d at 951 (internal quotations and citations omitted). Citing prior Illinois precedent, the *Carter* court further observed that an emergency response driver's conscious decision to proceed into a crowded intersection, against a red light, at high speeds, could constitute willful and wanton conduct; *i.e.*, conduct reflecting conscious disregard for the safety of others. *Carter*, 328 F.3d at 952 (internal quotations and citations omitted). The *Carter* court thus concluded that the district court had erred in granting summary judgment on the plaintiff's state-law willful and wanton claim, and reversed and remanded for trial.

Turning to the §1983 claim, the court acknowledged that "where actual deliberation is possible, conduct that is 'deliberately indifferent' may in certain circumstances 'shock the conscience.'" *Carter*, 328 F.3d at 952. However, without any consideration of whether actual deliberation was possible in the case before it, the court then held that all emergency response cases – not just high-speed pursuits – require proof of intent to harm. *Id.* On this basis, and without any further analysis, the court affirmed the district court's grant of summary judgment on the §1983 claim.

Carter is flawed. There is no way to reconcile the court's recognition that a deliberate-indifference standard applies where actual deliberation is possible, with its subsequent conclusion – devoid of any analytical underpinning – that an intent-to-harm standard ap-

plies in all emergency response cases without regard to whether actual deliberation was possible. Nor can it be suggested that the court's conclusion in this regard is premised upon the unstated assumption that, as a matter of law, actual deliberation is impossible during emergency response, because the court's earlier discussion of the plaintiff's state-law claim already led to the conclusion that the defendant deputy's conduct could amount to *conscious disregard* for the safety of others. This conclusion is meaningful because "deliberate indifference" for §1983 purposes means actual knowledge and disregard – *i.e.*, conscious disregard – of an excessive risk. *Beer-Capitol v. Whetzel*, 256 F.3d 120, 131 (3rd Cir. 2001). *Carter* thus holds that the deputy's conduct was deliberately indifferent for state law purposes, but not for ~~§1983~~ purposes. There is no legal basis for that distinction. *Carter* is unpersuasive.

2. *Terrell v. Larson*

Terrell is even more unpersuasive. There the court, like the court in *Carter*, held that *Lewis'* intent-to-harm standard applies in all emergency response cases, not just pursuit cases. However, the *Terrell* court's conclusion in this regard was the natural extension of the same court's previous *en banc* decision in *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001)(*en banc*), which held that *Lewis'* intent-to-harm standard applies in pursuit cases "regardless of whether the chase conditions arguably afforded pursuing officers time to deliberate." *Terrell*, 396 F.3d at 977 (explaining the holding in *Helseth*). In other words, the Eighth Circuit has expressly disregarded the fundamental underpinning of the Supreme Court's *Lewis* decision – *i.e.*, the relevance of the opportunity for deliberation in determining the §1983

culpability standard – and has opted for a bright-line standard requiring intent-to-harm in all emergency response cases. The Eighth Circuit's standard not only exceeds the parameters of *Lewis*, but rests on reasoning contrary to *Lewis*.

Equally unpersuasive is the *Terrell* court's comment, in *dicta*, that even assuming a deliberate indifference standard applied under the circumstances and that the defendant's conduct amounted to deliberate indifference, it still would not "shock the conscience" for purposes of liability under §1983. The court's indication in this regard is misguided because it is premised upon the notion that motor vehicle collisions, and the conduct that leads to them, do not invoke Constitutional concerns (*see, e.g., Terrell* at 981: "Traffic accidents of this nature are tragic but do not shock the modern-day conscience"). There is nothing in this Court's *Lewis* decision to support this proposition and, in fact, *Lewis* specifically warns against applying substantive due process analysis as a "matter of rule." *Lewis*, 523 U.S. at 850. The absence of such reasoning from the *Lewis* decision, and the fact that *Lewis* was resolved on entirely different grounds, strongly indicates that this Court does not view motor vehicle collisions as immune from Constitutional consequence under §1983.

Far more persuasive is the compelling dissent in *Terrell*, written by Circuit Judge Lay, and joined in by Circuit Judges Heaney and Bye. The dissenters recognize that, under *Lewis*, the opportunity for deliberation is the touchstone for determining the applicable culpability standard in an action under §1983. *Terrell* at 982 ("In situations where actual deliberation by an officer is practical, conduct that is deliberately indifferent may shock

the conscience"); and at 984 ("*Lewis* compels an examination of the officer's opportunity to deliberate...."). The dissenters further recognize that "[c]ontext is of vital importance in due process analysis," *id.* at 985, and that a police pursuit is distinguishable from other emergency responses, so that the former may appropriately require intent-to-harm as a prerequisite for the imposition of liability, whereas the latter require only deliberate indifference. Finally, the dissenters express understandable dismay at the logistical fallacy engendered by the majority decision. *Terrell* at 984 ("We find it strange indeed that under the rule announced today, the deliberate indifference standard no longer applies when an officer has the opportunity to deliberate and *actually does deliberate*")(emphasis in original). The decision of the court of appeals in the case at bar leads to this same "strange" result.

B. These Circuits Are Split

It is problematic enough that these three circuit courts have reached the same erroneous conclusion that a bright-line purpose-to-cause-harm standard applies to all emergency vehicle response cases. This problem is made worse by the fact that the circuits are split on the reasoning that led them to that conclusion.

1. The Case At Bar

As indicated, in the case at bar, the court of appeals held that a purpose-to-cause-harm standard applies in all emergency vehicle response cases under § 1983, and it may be inferred, from the appellate court's abstractions regarding the supposedly hurried nature of all emergency response activities, that the court's conclusion was predicated upon the notion that there is never

an opportunity for actual deliberation in such circumstances, even where the government actor *admits* that he did deliberate.

2. *Carter v. Simpson*

The *Carter* court reached the same conclusion regarding the applicable culpability standard, but it did so without making any finding that there was no opportunity for actual deliberation, and, to the contrary, only after first concluding – at least for purposes of the plaintiff's state law claims – that there *was* an opportunity for deliberation. So, like the Tenth Circuit, the Seventh Circuit disregards evidence that would support a finding of an opportunity to deliberate, and engages in *a priori* reasoning to reach a contrary legal conclusion applicable to all emergency response cases.

3. *Terrell v. Larson*

The *Terrell* court also reached the same conclusion, but, unlike either the Seventh or Tenth Circuits, the *Terrell* court – following its earlier decision in *Helseth* – expressly disregarded the concept of deliberation (*i.e.*, it is not even a factor in the Eighth Circuit). *Terrell* is, therefore, irreconcilable not only with this Court's decision in *Lewis*, but also with the Seventh Circuit's decision in *Carter*, and the Tenth Circuit's decision in this case.

III. THE ERRONEOUS REASONING AND CONCLUSION OF THE COURT OF APPEALS IN THE CASE AT BAR, AND THE CONFLICT AMONG THE CIRCUITS ON THE PROPER CONSTRUCTION OF THIS

COURT'S DECISION IN *COUNTY OF SACRAMENTO V. LEWIS*, WARRANTS REVIEW IN THIS COURT BY WRIT OF CERTIORARI

Under Supreme Court Rule 10(c), a "compelling reason" for this Court to grant certiorari includes a situation in which "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court". Sup.Ct.R. 10(c). As demonstrated, the decision of the court of appeals in the case at bar conflicts with this Court's decision in *Lewis*.[3] Supreme Court Rule 10(a) further provides that

---

[3] The determination of whether *Lewis* decided the issue before the court of appeals depends on how broadly or narrowly *Lewis* is construed. The district court construed *Lewis* as a decision of sufficient breadth to govern not only high-speed police pursuit cases, as to which this Court specifically concluded that deliberation was not possible such that a purpose-to-cause-harm standard would always apply, but also to other contexts, as to which this Court provided the governing analytical methodology. Thus, the district court observed:

> By elucidating what conduct does not rise to the level of a constitutional grievance, the Supreme Court necessarily illuminated what conduct may in fact constitute a substantive due process violation and, therefore, provided guidance for determining the contours of the right. More specifically, the *Lewis* Court recognized the existence of a substantive due process violation based on deliberate indifference where, although there is an opportunity to deliberate prior to acting, defendants nevertheless take action in conscious and unreasonable disregard of the consequences.

(App. at 40) The district court's interpretation of the scope of the *Lewis* decision is correct. Under that interpretation, the court of appeals decision is inconsistent with *Lewis*.

another "compelling reason" for granting certiorari may be found where a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. Sup.Ct.R. 10(a). As demonstrated, the decisions of the courts of appeals in this case and in *Carter* conflict with the decision of the court of appeals in *Terrell*.

The question remains, however, whether the issue at bar presents an important federal question. It does.

The dissenting judges in *Terrell* accurately summed up the magnitude of the issue as follows:

> Today's decision has the effect of giving police officers unqualified immunity when they demonstrate deliberate indifference to the safety of the general public. A police officer may now kill innocent bystanders through criminally reckless driving that blatantly violates state law, police department regulations, accepted professional standards of police conduct, and the community's traditional ideas of fair play and decency so long as the officer subjectively, though unreasonably, believed an emergency existed. The majority's holding extends *Lewis'* high-speed pursuit rule from its intended purpose of protecting officers forced to make split-second decisions in the field to a per se rule that now shields officers even after they have had an actual opportunity to deliberate at the police station.

Terrell, 396 F.3d at 981 (Lay, Circuit Judge, dissenting, joined by Heaney and Bye, Circuit Judges).

The same is true of the decision of the court of appeals in the case at bar. Through its misinterpretation and misapplication of this Court's decision in *Lewis*, the court of appeals has effectively removed any substantive due process limitation of real consequence upon the actions of government officials responding to emergency situations in all circumstances. Not only is such a result not what this Court intended in *Lewis*, it is just the opposite of what this Court intended ... and it is important.

Furthermore, the impropriety of the court of appeals' foray into abstractions regarding the opportunity for actual deliberation during emergency vehicle response, with disregard for or at least in contradiction to the actual evidence in the case, which allowed the court to transform an issue of fact into an issue of law, is itself an error of constitutional dimension presenting an important issue for this Court. As the Tenth Circuit itself has recognized, "It is fundamental that issues of fact are for the jury, and that the right to have such questions decided by a jury is of constitutional status". *Meeker v. Rizley*, 346 F.2d 521 (10th Cir. 1965). In the case at bar, however, the court of appeals ruled as a matter of law in a context pervaded by unresolved and triable issues of fact. That is not what this Court had in mind in *Lewis* when it instructed that in all cases other than high-speed police pursuits, the applicable culpability standard must be determined on a case-by-case basis, and only after careful "appraisal of the totality of facts in a given case". *Lewis*, 523 U.S. 850.

Finally, and not insignificantly, a tragic death has occurred. And, although that fact – standing alone – is by no means sufficient to shroud this case with the trappings of constitutional importance to justify this Court's discretionary review, it is a fact which clearly identifies the stakes, and which renders the magnitude of the court of appeals' demonstrated error all-the-more in need of correction. It is a fact which exemplifies a recurring reality in our society; and the court of appeals, in a decision that is contrary to *Lewis*, has deprived this case, and all like it, of their day in court under 42 U.S.C. §1983. Petitioners submit that that is important.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL J. COHEN
Counsel of Record
LAKIN LAW FIRM
300 Evans Avenue
Wood River, Illinois 62095
(618) 254-1127

Attorneys for Petitioners

Filed
United States Court of Appeals
Tenth Circuit
December 27, 2005
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ANGELA PEREZ AND HECTOR BECERRA, Plaintiffs-Appellees,

v.

UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/KANSAS CITY, KANSAS; KANSAS CITY, KANSAS FIRE DEPARTMENT, Defendants

And

ANTHONY W. MOTS, individually and in his official capacity, Kansas City, Kansas Fire Department, Defendant-Appellant.

No. 04-3397

Appeal from the United States District Court for the District of Kansas

(D.C. No. CV-02-2492-DJW)

Michael W. Shunk, McCormick, Adam & Long, P.A., Overland Park, Kansas for the Defendant-Appellant.

Daniel J. Cohen, Lakin Law Firm, Wood River, Illinois (Davy C. Walker, The Law Offices of Davy C. Walker, Kansas City, Kansas with him on the briefs) for the Plaintiffs-Appellees.

Before **LUCERO, BRORBY** and **HARTZ**, Circuit Judges.

LUCERO, Circuit Judge.

Anthony Mots, a firefighter, seeks qualified immunity from a claim that he violated the constitutional rights of Aaron Becerra when his fire truck collided with Becerra's car. Because Mots was responding to an emergency call and because it is not alleged that Mots intended to harm Becerra, we conclude that Mots it entitled to qualified immunity as a matter of law. We **REVERSE** the district court's denial of summary judgment

and **REMAND** with directions to dismiss Becerra's 42 U.S.C. § 1983 claims.

I

Mots is a firefighter employed by the Kansas City, Kansas Fire Department, a division of the Unified Government of Wyandotte County/Kansas City, Kansas ("Unified Government"). He was stationed at Pumper Station 9 when a house fire was reported over the dispatch system. He was dispatched to the fire and turned on his fire truck's emergency lights and siren as soon as he left the station.

To reach the fire, Mots drove his fire truck westbound on Central Avenue, a major thoroughfare. Because it was an emergency call, he was speeding. According to an eye witness, Mots was traveling down Central Avenue at forty miles-per-hour, exceeding the thirty mile-per-hour speed limit.

Where Central Avenue crosses 18th Street is a five-way intersection; another major thoroughfare, Park Drive, shoots off this intersection to the southwest. The configuration of the buildings on this corner can block emergency lights and the sound of a siren. According to several witnesses, there was a red light when Mots approached the intersection. Mots testified that he did not remember whether there was a red light when he reached the corner, but, if there had been, it would have been visible for several blocks as he approached the intersection.

Before he reached 18th Street, Mots moved into the eastbound lane of oncoming traffic on Central Avenue because westbound traffic would not move in re-

sponse to his siren and emergency lights. He also blew his air horn to warn other cars about his approach.

Mots slowed down as he approached the intersection, but did not stop. He then sped up as he went through it. The materials used to train Kansas City firefighters recommend that drivers should come to a complete stop before entering a negative right-of-way intersection, [4] but the Fire Department's official policy does not require vehicles to come to a complete stop.

Becerra entered the intersection going eastbound on Central Avenue. Mots did not see Becerra's car until a split second before he slammed into it. Several eyewitnesses – including one in a car that Mots swerved around – said that Becerra's car was visible coming headlong into Mots's path. An accident reconstruction expert stated that the firetruck hit Becerra's car in a direct collision at twenty three to twenty four miles per hour. Becerra died as a result of injuries sustained in the accident.

Hector Becerra ("Hector"), administrator of Becerra's estate, brought suit against Mots and the Unified Government. He was joined as a plaintiff by Angela Perez, who brought her claim on behalf of Sabrina Becerra, Becerra's daughter and legal heir[5]. They each alleged violations of the Kansas Tort Claims Act, Kan. Stat. Ann. § 75-6101 et seq., and violations of Becerra's constitutional rights under 42 U.S.C. § 1983 by Mots

---

[4] A negative right-of-way intersection is any intersection at which a driver faces a red light or a stop sign.

[5] Angela Perez is birth mother, legal guardian and next friend to Sabrina Becerra.

and by the Unified Government. Hector and Perez claimed that Mots violated Becerra's Fourteenth Amendment rights and that the Unified Government failed to properly train and supervise Mots and had policies that caused Becerra's death. The Unified Government and Mots moved for summary judgment on the § 1983 claims. Mots asserted in his motion that the § 1983 claim against him was barred by qualified immunity.

The district court dismissed Perez's § 1983 claims for lack of standing but held that there were questions of material fact that precluded summary judgment on Hector Becerra's § 1983 claim against Mots. Specifically, it found that there were questions of material fact about both the proper standard to apply and the result upon the application of the applicable standard. Utilizing a novel reading of Supreme Court's decision in County of Sacramento v. Lewis, 523 U.S. 833, 851 (1998), the court held that there was a question of material fact as to whether Mots' action should be evaluated under a "deliberate indifference" or an "intent to harm" test. It further determined that there were questions of material fact as to whether Mots showed deliberate indifference to the life and liberty of Becerra. Finally, it held that Supreme Court jurisprudence clearly established the right Mots allegedly violated. As such, it denied Mots' motion for summary judgment. Mots filed an interlocutory appeal to this court challenging this denial.

II

Government officials who perform discretionary functions are entitled to qualified immunity if their conduct does not violate clearly established rights of which

a reasonable government official would have known. Hulen v. Yates, 322 F. 3d 1229, 1236 (10th Cir. 2003). When a defendant raises a qualified immunity defense, the plaintiff bears the burden of establishing that the defendant's conduct violated a constitutional or statutory right and that the right was clearly established at the time of conduct. Id. At 1237.

We have jurisdiction to hear purely legal questions that arise from interlocutory appeals of denials of summary judgment motions based on qualified immunity. Perez v. Ellington, 421 F. 3d 1128, 1131 (10th Cir. 2005). "Our inquiry focuses on 'whether the facts alleged support ... a claim of a violation of clearly established law.'" Id. at 1128 (quoting Mitchell v. Forsyth, 472 U.S. 511, 528 (1985)). In de novo review of the alleged facts demonstrates that they do not amount to a violation of a clearly established right, we reverse a denial of summary judgment on qualified immunity grounds. Id. If a plaintiffs' version of the facts does not amount to a violation of a clearly established right, we lack jurisdiction to review the denial of summary judgment on an interlocutory basis for sufficiency of the evidence. Id; see also Johnson v. Jones, 515 U.S. 304, 313-18 (1995).

Hector alleges that Mots violated the Fourteenth Amendment by crashing into Aaron Becerra's car. The Due Process Clause has a substantive component, which bars "certain government actions regardless of the fairness of the procedures used to implement them." Lewis, 523 U.S. 840 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). Substantive due process protects individuals against "arbitrary action of government" that deprives a citizen of life, liberty or property "whether

the fault lies in a denial of fundamental procedural fairness ... or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." Id. at 845-46 (citations and quotations omitted).

That said, the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States." Id. 523 U.S. at 848 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)). Only government conduct that "shocks the conscience" can give rise to a substantive due process claim. Id.

In Lewis, the Supreme Court clarified how courts should determine whether government action shocks the conscience. The Court held that a police officer who slammed his car into a motorcycle during a high-speed chase did not violate the Fourteenth Amendment because there was no allegation that the officer intended to harm the motorcycle driver. Lewis established a clear rule: When governmental officials face a situation "calling for fast action," only official conduct done with an intent to harm violates the Fourteenth Amendment. Id. at 853. "[W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates the large concerns of the governors and the governed." Id. (internal quotations and citations omitted).

The Court acknowledged, however, that behavior that would not violate the Fourteenth Amendment if done in a time-sensitive, high-pressure situation may nevertheless shock the conscience if the official has time to deliberate before acting. Thus, the Court held that

when a government official has enough time to engage in "actual deliberation," conduct that shows "deliberate indifference" to a person's life or security will shock the conscience and thereby violate the Fourteenth Amendment. Id. at 851. "[L]iability for deliberate indifference ... rests upon the luxury... of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." Id. at 853.

The Court cautioned that "actual deliberation" meant more than having a few seconds to think. It stated:

> By 'actual deliberation,' we do not mean 'deliberation' in the narrow, technical sense in which it has sometimes been used in traditional homicide law. See, e.g., Caldwell v. State, 203 Ala. 412, 84 So. 272, 276 (Ala. 1919) (noting that "deliberation here does not mean the man slayer must ponder over the killing for a long time"; rather, "it may exist and may be entertained while the man slayer is pressing the trigger of the pistol that fired the fatal shot[,] even if it be only for a moment or instant of time").

Lewis, 523 U.S. at 851 n. 11 (emphasis added). The intent to harm standard is not limited to situations calling for split-second reactions. Rather, it applies whenever decisions must be made "in haste, under pressure, and frequently without the luxury of a second chance." Id. at 853. As the Eighth Circuit recently noted, "the intent-to-harm standard most clearly applies in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation." Terrell v. Larson, 396 F.3d 975, 978 (8th Cir. 2005) (en banc).

We have not had occasion to apply Lewis to a situation where a firefighter or police officer is involved in an automobile accident while responding to an emergency call.[6] However, it is clear from Lewis that the intent to harm standard applies in this case. A firefighter responding to a house fire has no time to pause. He has no time to engage in calm, reflective deliberation in deciding how to respond to an emergency call. Doing so would risk lives. This case presents a paradigmatic example of a decision that must be made in haste and under pressure.

Two other circuits and one state supreme court have addressed cases nearly identical to this one and have applied Lewis's intent to harm standard as well. In Carter v. Simpson, 328 F.3d 948, 949 (7th Cir. 2003), the plaintiff alleged that a police officer violated the Fourteenth Amendment by responding to an emergency call by speeding, changing lanes into on-coming traffic, and

---

[6] We did face the question before the Supreme Court decided Lewis. Under our pre-Lewis jurisprudence, even extremely reckless driving by an emergency response provider did not constitute a violation of the substantive due process clause. In Apodaca v. Rio Arriba County Sherriff's Dep't, 905 F.2d 1445, 1447 (10th Cir. 1990), plaintiffs alleged that a police officer violated their substantive due process rights when he crashed into them when responding to an emergency call. The officer was engaged in reckless driving that exceeds anything alleged in this case; he was speeding around a blind curve in the middle of the night in rain and sleet without his siren or lights on. Id. at 1446. We held that as a matter of law, the "negligent operation of a vehicle by a police officer does not rise to the level of a constitutional violation." Id. at 1447. We specifically rejected the argument that the officer's conduct exceeded negligence and was hence actionable. "[I]n whatever manner plaintiffs attempt to dress up their claims, their cases come down to allegations that [the officer] was driving too fast for the road and visibility conditions." Id. at 1447 n.3.

crashing into another car at an intersection, killing the driver. It held that the intent to harm standard applies in all cases where officers respond to an emergency call. "Although [the officer] was not engaged in a highspeed chase (as in Lewis), he was responding to an emergency call. Because there was no evidence that he intended to cause any harm, the district court correctly granted summary judgment for [the officer]." Id. at 952.

The same result was reached by the Eighth Circuit in Terrell. There, police officers decided to provide extra back-up to a reported domestic disturbance. They drove through a red light and crashed into another car. Because the plaintiffs, next of kin to a driver killed in the accident, did not allege an intent to harm, the could not sustain a § 1983 claim based on the police officer's violation of the Fourteenth Amendment. "[T]he intent-to-harm standard of Lewis applies to an officer's decision to engage in high-speed driving in response to other types of emergencies, and to the manner in which the police car is then driven in proceeding to the scene of the emergency." Terrell, 396 F.3d at 980-81.

Likewise, in Norton v. Hall, 834 A.3d 928 (Me. 2003), the Maine Supreme Court held that a police officer's allegedly reckless driving while responding to a report of an "out-of-control" child in the home of a suspected child abuser (which led to a car crash) was the type of behavior that called for the application of the intent to harm standard. "To respond effectively to an emergency, an officer must make an immediate decision. [The officer] weighed her concern for the welfare of a child ... against the risk of speeding and exposing other citizens to danger. Under these circumstances, ... the highest standard of 'intent to harm' applies." Id. at

934. No case has applied the deliberate indifference standard to a situation where a government official is responding to an emergency.

Determining whether an emergency response provider was reckless in his driving depends on the danger posed by the emergency, the traffic conditions in a locality, and numerous other factors. State and local policymakers can and do make rules governing how their emergency response providers should drive and the consequences for failing to do so. However, it simply cannot be said that the decision to drive quickly – even recklessly so – in response to an emergency call shocks the conscience.

In holding that there was a question of material fact as to whether the deliberate indifference standard should apply the district court committed a mistake of law[7]. Under Lewis, the court should have applied the intent to harm standard. We may have remanded the case to the district court for application of the proper standard, but Becerra conceded at oral argument that there were no allegations and no facts in this case that supported a claim that Mots had intent to harm. Because there is no such allegation in the complaint, we need not reach the question of what showing is necessary to

---

[7] Determining the proper legal standard is generally a question of law, not a question of fact. Terrell, 396 F.3d at 981 (8th Cir. 2005) ("Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury."); see also City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 753 (1999) (Souter, J., concurring in part and dissenting in part) ("Substantive due process claims are, of course, routinely reserved without question for the court.") (citing Lewis, 523 U.S. at 853-55).

evince an intent to harm. We simply hold that a bystander hit by an emergency response vehicle in the process of responding to an emergency call cannot sustain a claim under the substantive due process clause without alleging an intent to harm. As such, Mots should be granted qualified immunity.

Accordingly, we **REVERSE** the district court's denial of summary judgment and **REMAND** with directions to dismiss Hector's § 1983 claims.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Sabrina Becerra, a minor, Natural Dependent Daughter and Legal Heir of Aaron M. Becerra, Deceased, by and through her Natural Mother, Legal Guardian and Next Friend, ANGELA PEREZ, et al.,

Plaintiffs,

vs.

Case No. 02-2492-DJW

UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/KANSAS CITY, KANSAS, et al.,

Defendants.

MEMORANDUM AND ORDER

This is a lawsuit to recover for personal injuries and wrongful death arising out of a collision between a fire truck and a private automobile. Defendants' Motion for Summary Judgment (doc. 105) is ready for decision and, for the reasons below, the Motion is granted in part and denied in part.

I. Facts

The following facts are either uncontroverted or presented in the light most favorable to Plaintiffs, the nonmoving parties:

A. The Collision

Anthony Mots ("Mots") is employed as a firefighter with the Kansas City, Kansas Fire Department, a division of the Unified Government of Wyandotte County/Kansas City, Kansas ("Unified Government"). In the course of responding to an emergency call on September 30, 2000, Mots – who was driving a fire truck westbound on Central Avenue – struck a vehicle being driven southbound on 18th Street by Aaron Becerra ("Becerra"). Becerra subsequently died as a result of the injuries he sustained in this accident.

Mots activiated emergency lights and sirens on the fire truck when he left the fire station. Mots acknowledges there were no traffic signals restricting westbound Central Avenue traffic at 15th, 16th or 17th Streets and concedes he may have been able to see the 18th Street/Central Avenue traffic light governing his westbound direction of travel on Central Avenue as early as 14th Street. There is a dispute between the parties regarding the color of the traffic signal at the time Mots drove through the 18th Street/Central Avenue intersection: Plaintiffs allege the traffic light was red as Mots approached and drove through the intersection. Defendants maintain the 18th Street light was red as Mots traveled on westbound Central through the intersections at 15th, 16th and 17th Streets, but that the 18th Street light turned green for westbound traffic on Central at some point during the time Mots was traveling

from 17th to 18th Street. For purposes of ruling on the pending Motion for Summary Judgment, the Court views the facts in the light most favorable to Plaintiffs; thus, the Court deems Mots to have run a red light prior to the collision.

Although neither Mots nor the supervisory captain riding in the seat next to Mots know the rate of speed at which the fire truck was traveling between 14th Street and the 18th Street/Central Avenue intersection, Mots believes he had an adequate opportunity to appraise the roadway ahead of him – including the intersection, traffic and traffic lights – and decide how he was going to navigate through the traffic as he approached the intersection.

Central Avenue and 18th Street meet in a five-way intersection with a building on the northeast corner. This building can blanket and/or ricochet the sirens and horns of an emergency vehicle and also can blanket or block the line of sight to the lights of an emergency vehicle.

The emergency lights and sirens were operating and Mots sounded the air horn as the fire truck approached the 18th Street/Central Avenue traffic signal. Due to the position of other vehicles heading westbound in front of him and stopped for the red light, Mots moved the fire truck from the westbound lane of traffic into the eastbound lane for oncoming traffic and subsequently entered the intersection in that lane. Even though the light was red, Mots did not stop the fire truck at the traffic light and accelerated to increase the speed of the fire truck as he entered the intersection. Although, again, neither Mots nor the supervisory captain riding in the seat next to Mots know the rate of speed at

which the fire truck was traveling prior to the collision, Plaintiffs' accident reconstruction expert calculates a speed of 23-24 miler per hour at impact.

Although Mots did not see the Becerra vehicle until a split second before the collision, eyewitness Kenneth Lee, who was stopped at the red light on westbound Central Avenue on 18th Street as the fire truck went around him, was able to see Becerra's vehicle as Becerra approached and entered the intersection on southbound 18th Street.

B. Fire Department Written Training Materials

The emergency vehicle operators' training materials used by the Unified Government to train Kansas City, Kansas fire department drivers include materials from the International Fire Service Training Association ("IFSTA"). The IFSTA manuals are maintained in fire station libraries and at the fire department library in order to provide training opportunities for fire department employees. The fire department's goal in making IFSTA emergency vehicle training materials available to its drivers is to ensure that an emergency vehicle is operated safely, and that the vehicle arrives safely at its destination. When a fire department employee seeks a promotion to the position of driver, the employee must pass a test consisting of questions derived from IFSTA materials. Emergency vehicle drivers should, therefore, know the basic concepts of emergency driving as outlined in the materials made available to them, which include the IFSTA books.

C. Fire Department Policies, Practices and Traing Regarding Travel Route, Travel Speed and Traveling Through Intersections

1. Travel Route

a. Testimony of Anthony Mots

When a dispatcher transmits an emergency fire call to the fire station, Mots – as the driver of the fire truck – first ascertains the site location and determines a travel route to reach the site. Mots then gets in the fire truck, pulls out on the roadway and begins traveling his predetermined route. Mots always travels the most direct route when responding to an emergency fire call.

Mots acknowledges that buildings at an intersection can blanket or redirect siren noise, and thereby increase the potential for a collision. Mots also acknowledges that a busy and congested intersection is more prone to collisions involving emergency vehicles, and that the more roadways there are at an intersection, the higher the risk for collision. Nevertheless, even assuming that the features of the intersection make it more dangerous than another intersection, Mots always travels the most direct route when responding to an emergency fire call and does not change his chosen route to avoid an intersection that he believes is more hazardous.

b. Testimony of Fire Chief Thomas DeKeyser

Thomas DeKeyser has been the Chief of the Kansas City, Kansas Fire Department since 1996, and his duties include general leadership and development of policies and procedures, including general orders, special orders, bulletins, memorandums, standard operating guidelines and rules of conduct. It is DeKeyser's job to interpret and define the meaning of a department policy if such a policy comes into question. In selecting a

travel route to a fire emergency, DeKeyser deems speed of response as the paramount consideration.

c. Testimony of Captain Stephen

In choosing the route to a fire emergency, Captain Stephen, who is Mots' supervisory captain and was seated to Mots' right at the time of the collision, will not avoid an intersection because the intersection, due to congestion, traffic count, nature of signals, nature of road layout, or the presence of building structures, is more risky. To the contrary, he will go through that intersection: "[c]losest route is what we like to go."

d. Training Materials

In selecting a proper response route, IFSTA emergency vehicle operators' training materials used by the Unified Government to train Kansas City, Kansas fire department drivers instruct that the most direct route may not be appropriate; traffic, population and the hazardousness of the intersection are factors to be considered in deciding upon a route. The materials also note the importance of arriving safely at the destination of the fire.

2. Travel Speed

a. General Order 96

General Order 96, the Unified Government's written policy regarding operation of emergency response vehicles, prohibits driving too fast for existing conditions and specifically prohibits drivers from exceeding the posted speed limit at any intersection.

b. Written Training Materials

Defendants' written training materials stress that safely arriving at the destination of the fire is more important that speedily arriving there.

c. Testimony of Anthony Mots

In responding to an emergency fire call, Mots decides what speed he believes is appropriate given the road conditions, the traffic and the traffic signals. In deciding at what speed he will travel, Mots considers the time it would take to react to existing roadway conditions.

d. Testimony of Fire Chief DeKeyser

Although it would violate that portion of General Order 96 prohibiting drivers to exceed the posted speed limit at any intersection, DeKeyser is unwilling to embrace the suggestion that a speed of 50 miles per hour by Mots under the specific circumstances presented (a posted speed limit of 30 miles per hour through a red light at a five-way intersection with buildings potentially obstructing sight and sound) would have been inappropriate.

3. Slowing Down vs. Stopping Before Traveling Through Negative Right-of-Way Intersections

a. General Order 96

General Order 96 provides, among other things, that an emergency response vehicle approaching a negative right-of-way intersection shall slow down and prepare to stop. General Order 96 also instructs that, in such a situation, the emergency vehicle may proceed only when the driver can account for all oncoming traf-

fic, in all lanes, and can verify that such oncoming traffic is yielding the right-of-way.

b. Written Training Materials

Specific directives within IFSTA training materials utilized by the Kansas City, Kansas Fire Department instruct that a driver/operator should stop before entering a negative right-of-way intersection, even if local policies or state statutes permit travel against a red light or stop sign.

c. Driver Training

Steven Jensen is a Kansas Highway Patrol Officer who provided some of the driver training to the Unified Government's fire department, including Mots. The training he provided does not recommend that emergency vehicles be brought to a stop before entering a negative right-of-way intersection. As opposed to a general rule requiring a driver to stop at every intersection in emergency responses, Jensen instructs drivers to duly regard the safety of others by scanning the intersection upon approach and then proceeding through such intersection only after verifying it is clear.

Jensen believes Mots' driving on the day in question was reasonable under the circumstances and would deem Mots' driving to be "out of control" on that day only if

- Mots traveled at an unreasonable speed upon approach to the intersection, and

- Mots incorrectly scanned the intersection prior to and upon entering it by failing to take into account every situation that could exist dealing with factors such as the light, weather, road, traffic and pedestrians.

d. Testimony of Anthony Mots

Mots usually does not stop before entering a negative right-of-way intersection, and Mots did not bring the fire truck to a stop before entering the intersection at issue here.

e. Testimony of Fire Chief DeKeyser

Fire Chief DeKeyser acknowledges training materials that direct a driver to stop before entering a negative right-of-way intersection may contradict General Order 96, the Fire Department's official policy. According to DeKeyser, drivers should follow the department's official policy, which requires a driver to slow down, prepare to stop and proceed only when the driver can account for all oncoming traffic, in all lanes, and verify that such oncoming traffic is yielding the right-of-way. DeKeyser has never communicated to any of his drivers to stop for red lights, and he is not aware of anyone ever having made that communication.

II. Summary Judgment Standard

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue of material fact" and that it is "entitled to judgment as a matter of law."[8] In applying this standard, the Court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.[9] A fact is "material" if it is "essential to the proper disposition of the claim" and an issue of fact is "genuine" if "there is

---

[8] Fed. R. Civ. P. 56(c).

[9] *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

sufficient evidence on each side so that a rational trier of fact could resolve the issue either way."[10]

The moving party bears the initial burden of demonstrating absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[11] In attempting to meet that standard, a movant who does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim.[12]

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." The nonmoving party may not simply rest upon its pleadings to satisfy its burden.[13] Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant."[14] "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein."[15] Although summary judgment is often appropriate to secure the just, speedy and inexpensive determination of a particular case without the need

---

[10] *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[11] *Id.* at 670-71.

[12] *Id.* at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

[13] *Anderson*, 477 U.S. at 256.

[14] *Adler*, 144 F.3d at 671.

[15] *Id.*

for trial, deeply rooted principles of justice require that issues of fact be presented to a jury for determination and "the right to have such questions decided by a jury is of constitutional status."[16]

III. Discussion

Plaintiffs' cause of action is set forth in four separate counts. Count I is a state law wrongful death claim brought pursuant to the Kansas Tort Claims Act. Except for limited issues related to standing, Defendants do not move for judgment on the state law claim; thus, notwithstanding any ruling here, the wrongful death cause of action brought pursuant to the Kansas Tort Claims Act is set to go forward to jury trial.

In Counts II, III, and IV, Plaintiffs claim Defendants are liable under 42 U.S.C. § 1983 for violating Becerra's substantive due process rights. Defendants argue they are entitled to judgment as a matter of law on all three of these section 1983 claims:

- Count II, alleging that Mots' operation of the fire truck violated Becerra's substantive due process rights;
- Count III, alleging that Mots' operation of the fire truck conformed to an official policy or established custom of the Unified Government, which violated Becerra's substantive due process rights; and
- Count IV, alleging that Mots' operation of the fire truck was attributable to inadequate training and/or supervision on the

[16] *Meeker v. Rizley*, 346 F.2d 521, 525 (10th Cir. 1965).

part of the Unified Government, which violated Becerra's substantive due process rights.

Defendants further argue they are entitled to judgment as a matter of law on:

- the claims of Hector Becerra in any capacity under the Kansas Wrongful Death Act, because he lacks standing to make such a claim;
- the claims of Sabrina Becerra and Hector Becerra (in his individual capacity only) under the Kansas statute for survival of claims, because they lack standing to bring such a claim; and
- the claims of Sabrina Becerra and Hector Becerra (in his individual capacity only) under 42 U.S.C. § 1983, because they lack standing to bring such a claim.

In responsive briefing, Plaintiffs concede the standing issues raised in Defendants' Motion and agree (1) that Sabrina Becerra is the only party with standing to pursue the wrongful death claims under Kansas law in Count One; (2) that Hector Becerra, in his capacity as Personal Representative on behalf of Aaron Becerra, is the only party with standing to pursue the survival claims under Kansas law in Count One; and (3) that Hector Becerra, in his capacity as Administrator of Aaron Becerra's Estate, is the only party with standing to pursue the federal claims in Counts II, III, and IV.

Given Plaintiffs' response to Defendants' arguments, Defendants' Motion for Summary Judgment due

to lack of standing will be summarily granted as unopposed. Accordingly, the Court hereby grants judgment as a matter of law in favor of Defendants on

(1) the claims of Hector Becerra under the Kansas Wrongful Death Act;

(2) the claims of Sabrina and Hector Becerra (in his individual capacity only) under the Kansas statute for survival of claims; and

(3) the claims of Sabrina Becerra and Hector Becerra (in his individual capacity only) under 42 U.S.C. § 1983.

The remaining issues presented for the Court's determination are whether Defendants are entitled to judgment as a matter of law on the section 1983 claims against Mots in his individual capacity and against the Unified Government as an entity.

A. Fourteenth Amendment Claim Against Individual Defendant Mots

Plaintiffs allege Mots violated Becerra's Fourteenth Amendment right to substantive due process of law by creating a dangerous situation that resulted in Becerra's death, thus depriving him of his life without due process of law. To establish a section 1983 substantive due process claim, Plaintiffs allege Mots' conduct "shocks the conscience."

Defendants maintain that Plaintiffs cannot establish a viable substantive due process claim because Mots' conduct does not rise to a level that "shocks the conscience" as required to support a section 1983 cause of action. Defendants further contend that even if Plaintiffs could establish Mots' conduct rises to a level that

shocks the conscience, Mots is shielded from liability by the doctrine of qualified immunity.

1. Substantive Due Process Violation

The Due Process Clause provides that the government may not "deprive any person of life, liberty or property, without due process of law."[17] Not every right or interest is entitled to protection under the substantive Due Process Clause.[18] Rather, a substantive due process claim is "founded upon deeply rooted notions of fundamental personal interests derived from [the] Constitution."[19] The standard for judging a substantive due process claim is whether the challenged government action "shocks the conscience."[20]

a. The "Shocks the Conscience" Standard

To satisfy this "shocks the conscience" standard, "a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power."[21] Instead, a plaintiff "must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking."[22] In determining the level of fault necessary to shock the conscience, the

---

[17] U.S. Const. Amend. XIV.

[18] *Archuleta v. Colorado Dep't of Inst., Div. of Youth Servs.*, 936 F.2d 483, 489 n.6 (10th Cir. 1991).

[19] *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1256 (10th Cir. 1998).

[20] *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 528 (10th Cir. 1998).

[21] *Id.*

[22] *Id.*

United States Supreme Court case of *County of Sacramento v. Lewis*[23] is instructive. The issue presented for decision in *Lewis* was whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in the context of a high-speed automobile chase, a chase aimed at apprehending a suspected offender. In *Lewis*, the defendant officer, driving a patrol car, pursued a motorcycle through a residential neighborhood for 75 seconds at speeds up to 100 miles per hour, covering a distance of 1.3 miles. The chase ended after the motorcycle fell over while turning. The patrol car struck the motorcycle passenger, killing him. The victim's family brought a section 1983 claim against the officer, the county, and the sheriff's office, alleging a substantive due process deprivation.

The Supreme Court held that under the specific facts presented, deliberate or recklessly indifferent conduct did not "shock the conscience" and therefore was insufficient to state a substantive due process claim. More specifically, the Court held that in light of the unforeseen circumstances demanding the officer's instant judgment, a demonstration of actual purpose to cause harm was necessary to establish liability.[24]

b. Level of Fault Necessary to Shock the Conscience in this Case: "Deliberate Indifference" or "Purpose to Cause Harm"?

---

[23] 523 U.S. 833, 848 (1998).

[24] *Id.* at 853.

The level of fault necessary to "shock the conscience" must be determined on a case-by-case basis and cannot be determined without first considering the immediate circumstances confronting the state actor.[25] A significant part of the Supreme Court's holding in *Lewis* is the proposition that where there is time for deliberation prior to acting, the level of fault for liability is reckless or deliberate indifference.[26] Where circumstances necessitate split second judgments, the standard of fault for liability is higher: an actual purpose to cause harm.[27]

Relying upon *Lewis*, Defendants allege Plaintiffs fail to present sufficient facts to support a finding that Mots had time to deliberate prior to the accident. Defendants contend that without facts to demonstrate Mots had time for deliberation before the collision, Plaintiffs must establish Mots had a "purpose to cause harm" – as opposed to engaging in conduct that was "deliberately indifferent" – in order to prevail on their theory that Mots' conduct shocks the conscience. Based on this rationale, and the fact that Plaintiffs have never alleged Mots had a purpose to cause harm, Defendants argue they are entitled to judgment as a matter of law.

Plaintiffs strenuously disagree with Defendants' underlying contention, arguing the evidence presented in conjunction with the motion for summary judgment establishes a genuine issue of material fact for trial regarding whether Mots had time for deliberation prior to the accident. For the following reasons, the Court agrees.

---

[25] *Id.*

[26] *Id.*

[27] *Id.*

c. Adequate Time and Opportunity to Deliberate Prior to Acting

In *Lewis*, the United States Supreme Court held that a state actor's liability for deliberate indifference turns upon the opportunity for deliberation by that state actor prior to engaging in the conduct at issue: "[a]s the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical."[28] Notably, the Court explained that its use of the word "deliberation" in this context should not be construed in a narrow, technical sense: "deliberation here does not mean that the man slayer must ponder over the killing for a long time; rather, it may exist and may be entertained while the man slayer is pressing the trigger of the pistol that fired the fatal shot, even if it be only for a moment or instant at time."[29]

Against this legal backdrop, and viewing the evidence in the light most favorable to Plaintiffs, the following facts persuade the Court that a genuine issue of material fact exists with respect to whether Mots had time for deliberation prior to the accident:

Upon receiving the emergency call on September 30, 2000, Mots first ascertained the location of the house fire and determined the most direct route to reach the

---

[28] *Id.* ("When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking."); *see, also, Radecki v. Barela*, 146 F.3d 1227, 1232 (10th Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999) (holding that when the state actor has the opportunity to deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience).

[29] *Lewis*, 523 U.S. at 851, n.11 (citation omitted).

site. Mots then got in the fire truck, pulled out on the roadway and began traveling his predetermined route. Mots activated emergency lights and sirens on the fire truck when he left the fire station.

As Mots traveled west on Central Avenue, there were no traffic signals impeding his progress at the 15th, 16th or 17th Street intersections. Mots may have been able to see the 18th Street/Central Avenue traffic light governing his westbound direction of travel on Central Avenue as early as 14th Street. Regardless, Mots believes he had an adequate opportunity to appraise the roadway ahead of him – including the 18th Street intersection, traffic and traffic lights – and decide how he was going to navigate the intersection. Neither Mots nor the supervisory captain riding along with Mots know the rate of speed at which the fire truck was traveling between 14th Street and 18th Street/Central Avenue intersection.

The emergency lights and sirens continued to operate and Mots sounded the air horn as the fire truck approached the 18th Street/Central Avenue traffic signal. As he approached the red light, Mots moved the fire truck from the westbound lane of traffic into the eastbound lane for oncoming traffic and entered the intersection in that lane. Although Mots had a red light, he did not stop the fire truck before entering the 18th Street intersection and accelerated the speed of the fire truck as he entered the intersection. Mots did not see the Becerra vehicle until a split second before the collision. Eyewitness Kenneth Lee, who was stopped at the red light on westbound Central Avenue at 18th Street as the fire truck went around him, was able to see Becerra's vehi-

cle as Becerra approached and entered the intersection on southbound 18th Street.

Central Avenue and 18th Street meet in a congested five-way intersection, including a building located on the northeast corner. Mots acknowledges that the more roadways that intersect, the more prone the intersection is to collisions. The building located on the northeast corner of the intersection obstructed and/or interfered with Mots view of the Becerra vehicle and potentially blanketed and/or redirected siren noise from Mots' fire truck. Notwithstanding prior knowledge of these circumstances, Mots would not change his chosen route to avoid such an intersection.

General Order 96, the Unified Government's written policy regarding operation of emergency response vehicles, provides that an emergency response vehicle approaching a negative right-of-way intersection shall slow down and prepare to stop. General Order 96 goes on to instruct that in such a situation, the emergency vehicle may proceed only when the driver can account for all oncoming traffic, in all lanes, and verify that such oncoming traffic is yielding the right-of-way. Specific directives contained within the Unified Government's training materials instruct that a driver/operator should stop before entering a negative right-of-way intersection, even if local policies or state statutes permit travel against a red light or stop sign.

Steven Jensen, the Highway Patrol Officer providing training to fire department drivers, instructs drivers to duly regard the safety of others by scanning each intersection upon approach and proceeding through such intersection only after verifying it is clear. Fire Chief DeKeyser requires fire department drivers to comply

with General Order 96, compelling a driver to slow down, prepare to stop and proceed only when the driver can account for all oncoming traffic, in all lanes, and verify that such oncoming traffic is yielding the right-of-way.

Plaintiffs' accident reconstruction expert calculate the speed of the fire truck at impact (after acceleration by Mots) to be 23-24 miles per hour. General Order 96, the Unified Government's written policy regarding operation of emergency response vehicles, prohibits driving too fast for existing conditions and specifically prohibits drivers from exceeding the posted speed limit at any intersection.

The Court is persuaded that the evidence presented above creates a material issue of fact regarding how much time Mots had to deliberate before the fatal collision. For example, Mots testifies he *may* have seen the 18th Street/Central Avenue traffic signal from four blocks away. In reviewing Mots' testimony in the context of the question posed at the deposition, the Court finds use of the word "may" by Mots in his testimony regarding whether he saw the 18th Street/Central Avenue traffic signal from four blocks away leaves open the possibility in Mots' mind that he *may not* have seen the traffic signal from four blocks away. Mots' hesitation in this regard interjects several critical questions of fact with respect to whether Mots had an opportunity to deliberate before the fatal crash:

- how far away was Mots from the intersection and traffic signal before seeing and/or appraising the traffic?

- at what speed was Mots traveling as he drove from 14th Street to 18th Street?
- how much time did Mots have to deliberate while he drove this distance?

Given Mots' uncertainty regarding where he was when he first was able to assess the 18th Street intersection, and lack of information regarding the speed of the truck from 14th Street to 18th Street, the Court cannot determine as a matter of law how much time Mots had to deliberate while he drove from 14th Street to 18th Street. For example, if a jury believes the fire truck was traveling at a speed of 30 miles per hour[30] in the four blocks[31] from the 14th Street intersection to the 18th Street intersection, Mots would have had approximately 34 seconds to assess the 18th Street intersection prior to reaching it. If a jury believes the fire truck was traveling at a speed of 20 miler per hour[32] from the 14th Street intersection to the 18th Street intersection, Mots would

---

[30] The speed limit on Central Avenue from the 14th Street intersection to the 18th Street intersection is 30 milers per hour. General Order 96, the Unified Government's written policy regarding operation of emergency response vehicles, prohibits drivers from exceeding the posted speed limit at any intersection.

[31] Assuming the distance from 14th and Central Avenue to 18th and Central Avenue is .28 miles. See http://www.mapquest.com/directions/main.adp?do=prt&mo=ma&un=m&go=1&1a=S%2014th%20St%20%26%20Central%20Ave&1c=Kansas%20City&1g=XyiMnRZpEHg%3d&2a=S%2018th%20St%20%26%20Central%20Ave&tabval=address&11=J1HRHh2aZbI%3d&2c=Kansas%20City&1n=WYANDOTTE%20COUNTY&cl=EN&2g=c%2bWnchCG0%2fo%3d&1s=KS&21=Upr1PjgiHng%3d&ct=NA&1v=INTERSECTION&2n=WYANDOTTE%20COUNTY&1y=US&1tabval=address&1z=66102&2s=KS&2v=INTERSECTION&did=1096569855&2y=US&2z=66102.

[32] Assuming Mots accelerated just prior to impact, at which time he was traveling at approximately 23 miles per hour.

have had approximately 50 seconds to assess the 18th Street intersection prior to reaching it.

Assuming the jury ultimately determines one or another particular combination of factual variables is credible, the next question of fact becomes whether the resulting time period (e.g., a range of time from approximately 34 seconds to approximately 50 seconds based on the assumptions above) constitutes a reasonable opportunity to deliberate under the circumstances.

Also creating a question of material fact regarding whether Mots had an opportunity for deliberation is testimony from Mots that he did not see the Becerra vehicle until a split second before the collision – testimony that directly contradicts Mots' own testimony that he had adequate opportunity to appraise the traffic at the intersection as he was approaching it. That Mots did not see the Becerra vehicle until a split second before the collision also contradicts the testimony of eyewitness driver Kenneth Lee, who was stopped at the red light on westbound Central Avenue at 18th Street as the fire truck went around him to proceed into the intersection. Lee was able to see the Becerra vehicle as it approached and entered the intersection on southbound 18th Street.

At this juncture, the Court finds it helpful to compare the factual circumstances in this case with the factual circumstances presented in *Lewis*.[33] In *Lewis*, the defendant officer, driving a patrol car, pursued a motorcycle through a residential neighborhood at speeds up to 100 miles per hour. The defendant officer did not choose the route he traveled, the speed at which traveled

---

[33] 523 U.S. at 836.

or whether to observe traffic signs and signals. The officer did not have an opportunity to appraise the roadway ahead of him and did not have an opportunity to decide how he was going to navigate through the traffic. In applying the higher "purpose to cause harm" standard to establish conscience shocking conduct, the *Lewis* court found that the undisputed facts established – as a matter of law – circumstances demanding the officer's instant judgment and were not circumstances where the officer had time for deliberation.

The facts presented here differ significantly from the facts in *Lewis*. Mots predetermined the route he would travel to reach the destination site. Mots chose the speed at which he traveled and, in so choosing, considered the road conditions, the traffic and the traffic signals. As Mots approached the intersection, he had an adequate opportunity to appraise the roadway ahead of him – including the intersection, traffic and traffic lights – and decide how he was going to navigate through the traffic. As noted above, a reasonable jury could believe Mots had as much as 34 to 50 seconds to assess the upcoming 18th Street intersection. Finally, although officers involved in suspect pursuits may be required to violate traffic laws or risk losing the suspect, Mots was not in danger of losing a suspect. Defendants' training materials stress that safely arriving at the destination of the fire is more important than speedily arriving there.

Applying the principles of *Lewis*, and viewing the evidence and all reasonable inferences therefrom in the light most favorable to Plaintiffs, the Court finds a genuine issue of material fact exists with respect to whether Mots had the opportunity for deliberation prior to the fatal accident. In other words, given the number of

critical facts that are either unknown or in dispute in this particular case, it is within the sole province of the jury to resolve the factual dispute regarding whether Mots had an opportunity to deliberate and, thus, whether the level of fault necessary to shock the conscience is "deliberate indifference" or "purpose to cause harm." Through this holding, the Court does not intend to suggest that in the context of a substantive due process claim, the factual issue of whether a state actor has an opportunity to deliberate may never be decided as a matter of law. Rather, this holding is limited to the unique circumstances of this case, circumstances that present for consideration a number of unknown and disputed facts that are critical to a determination regarding opportunity to deliberate.

Based on the existence of a genuine issue of material fact as described above, Mots is not entitled to summary judgment on Count II of Plaintiffs' Complaint. Thus, the factual issue regarding whether Mots had an opportunity to deliberate prior to the fatal accident must go forward to trial for determination by a jury. If a jury determines Mots had an opportunity to deliberate and, accordingly, that the level of fault necessary to shock the conscience is deliberate indifference, the jury then must go on to determine whether the facts establish Mots was deliberately indifferent to the Becerra's rights. On the other hand, if a jury determines Mots did not have an opportunity to deliberate and, accordingly, that the level of fault necessary to shock the conscience is purpose to cause harm, the jury necessarily must reject a finding of liability on behalf of Mots on grounds that Plaintiffs have never alleged Mots had a purpose to cause harm.

2. Qualified Immunity

Given the Court's finding that a factual issue exists regarding whether Mots, as a state actor, violated Becerra's Fourteenth Amendment right to substantive due process of law, the next question is whether Mots nevertheless is entitled to qualified immunity on Plaintiffs' claim.

a. Standards for Qualified Immunity

Qualified immunity is available to state actors who perform discretionary functions if their actions do not violate clearly established law of which a reasonable person would have known.[34] The two-part framework for analyzing claims of qualified immunity on summary judgment is well settled. "Once a defendant pleads qualified immunity, the plaintiff bears the burden of (1) coming forward with sufficient facts to show that the defendant's actions violated a federal constitutional or statutory right and (2) demonstrating that the right violated was clearly established at the time of the conduct at issue."[35] Only after determining on summary judgment that the plaintiff has come forward with sufficient evidence to find deprivation of a constitutional right does the court ask whether the right allegedly violated was clearly established at the time of the conduct at issue.[36]

As set forth above, the Court finds Plaintiffs have submitted sufficient facts from which a finder of fact

---

[34] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[35] *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1255 (10th Cir. 1998) (citing *Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997)).

[36] *Baptiste*, 147 F.3d at 1255 n.6 (citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)).

could determine that Mots violated Becerra's Fourteenth Amendment right to substantive due process of law. Accordingly, Plaintiffs have satisfied the first prong of the qualified immunity analysis. Turning to the second prong, the Court next considers whether, at the time the relevant conduct occurred, the right allegedly violated was clearly established.

b. Clearly Established Right

Plaintiffs allege the right at issue in this case is the right to be free from deliberate indifference by a state actor towards an obvious risk of harm under circumstances where deliberation by the state actor prior to acting was practical. In order to find this right was clearly established at the time of the conduct at issue, "[t]he contours of the right must [have been] sufficiently clear [so] that a reasonable official would [have understood] that what he [was] doing violate[d] that right."[37] Requiring the law to be "clearly established" before a waiver of qualified immunity may be found "insure[s] that officials may reasonably anticipate when their actions might give rise to liability for damages."[38]

In light of that purpose, "it is the plaintiff's burden to establish the asserted right's contours are sufficiently clear such that a 'reasonable official would understand that what he is doing violates that right.'"[39] As a general rule, to satisfy this burden, "a plaintiff must

---

[37] *Baptiste v. J.C. Penney Co.*, 147 F.3d at 1255 (citing *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987); *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995)).

[38] *Clanton v. Cooper*, 129 F.3d 1147, 1156 (10th Cir. 1997).

[39] *Lawmaster v. Ward*, 125 F.3d 1341, 1350 (10th Cir. 1997) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

establish that there is a Supreme Court or Tenth Circuit opinion on point, or that the clearly established weight of authority from other courts has held the law to be as the plaintiff maintains."[40]

That a plaintiff is unable to refer the court to an opinion that precisely matches the facts of his or her grievance is not necessarily fatal to the claim.[41] Instead, "where the reasonableness inquiry necessarily turns on the cases' particular facts such that the reasonableness determination must be made on an *ad hoc* basis, we must allow some degree of generality in the contours of the constitutional right at issue."[42] Accordingly, the Tenth Circuit "require[s] 'some but not precise factual correspondence' between the cases cited and the factual situation in the case at hand."[43] Were they to hold otherwise, courts "would be placing an impracticable burden on plaintiffs if [they] required them to cite a factually identical case before determining they showed the law was 'clearly established' and cleared the qualified immunity hurdle."[44]

To that end, the Court believes that in September of 2000, the United States Supreme Court's holding in *Lewis*[45] was sufficiently clear to inform Mots that if he acted with deliberate indifference towards an obvious risk of harm to Becerra under circumstances where de-

---

[40] *Clanton*, 129 F.3d at 1156.

[41] *Id.* (citation omitted).

[42] *Lawmaster*, 125 F.3d at 1351.

[43] *Horstkoetter v. Dep't of Public Safety*, 159 F.3d 1265, 1278 (10th Cir. 1998) (citation omitted).

[44] *Clanton*, 129 F.3d at 1156 (citation omitted).

[45] 523 U.S. 833 (1998).

liberation prior to acting was practical, it would violate Becerra's constitutional rights. As noted earlier in this opinion, the Court readily acknowledges the facts in *Lewis* do not mirror the facts posed to the Court in this case.

Although the facts presented here and the facts in *Lewis* are critically different regarding determination of whether the state actor had an opportunity to deliberate, the Supreme Court established legal precedent in *Lewis* regarding the level of fault necessary to prove a substantive due process violation under circumstances where the state actor had an opportunity to deliberate and under circumstances where the state actor did not have an opportunity to deliberate. By elucidating what conduct does not rise to the level of a constitutional grievance, the Supreme Court necessarily illuminated what conduct may in fact constitute a substantive due process violation and, therefore, provided guidance for determining the contours of the right. More specifically, the *Lewis* Court recognized the existence of a substantive due process violation based on deliberate indifference where, although there is an opportunity to deliberate prior to acting, defendants nevertheless take action in conscious and unreasonable disregard of the consequences.

Based on Plaintiffs' version of the facts and controlling Supreme Court law at the time the conduct occurred, the Court believes that a reasonable fire truck driver, if placed in the position of Mots in this case, would have understood that, under circumstances where prior deliberation was practical, acting with deliberate indifference towards an obvious risk of harm to Becerra under circumstances would violate Becerra's constitutional rights. For this reason, the Court concludes that

Mots' request for judgment on the basis of qualified immunity must be denied.

B. Fourteenth Amendment Claims Against the Unified Government

When a section 1983 claim is asserted against a municipality, the Court examines first whether the actions of the government employee constitute a violation of the plaintiff's constitutional rights and, if so, whether the city is responsible for that violation.[46] With regard to the first component, the Court already has found that Plaintiffs have come forward with sufficient facts to establish that Mots' actions may have violated a federal constitutional right. Thus, the question now is whether Plaintiffs have come forward with sufficient evidence to demonstrate that the Unified Government is responsible for Mots' alleged violation.

1. Municipal Liability Based on Official Policy or Established Custom

In order for a municipality to be held liable under section 1983, a plaintiff must prove that a municipal policy or custom caused the plaintiff's alleged deprivation.[47] To that end, the Tenth Circuit Court of Appeals requires a plaintiff to satisfy each prong of the following three-part test in order to hold a municipality liable in a section 1983 suit: (1) the existence of a custom or practice of unconstitutional misconduct by the municipality's employees; (2) deliberate indifference to or tacit

---

[46] *Trigalet v. City of Tulsa, Oklahoma*, 239 F.3d 1150, 1155 (10th Cir. 2001).

[47] *Bd. of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 403 (1997).

approval of such misconduct by the municipality's policymaking officials after notice to the officials of that particular misconduct; and (3) injury to the plaintiff by virtue of the unconstitutional acts pursuant to the municipality's custom, as well as proof that the custom was the moving force behind the unconstitutional acts."[48]

a. Existence of Official Policy or Established Custom

The Unified Government may be held liable for violations of civil rights under section 1983 only if such violations result from the "execution of a government's policy or custom."[49] Thus, where there is no evidence that an employee's actions are consistent with an official policy or custom of the municipal employer, summary judgment is warranted.[50] An unconstitutional policy or custom need not be formal or written to create municipal liability.[51] A municipal custom or policy may be established through an officially promulgated policy, a custom or persistent practice, deliberately indifferent training that results in the violation of a plaintiff's federally protected rights, or a single decision by an official with final decision-making authority.[52]

---

[48] *Gates v. Unified Sch. Dist. No. 449 of Leavenworth Cty, Kan.* 996 F.2d 1035, 1041 (10th Cir. 1993); *Stewart v. Bd. of Comm'rs for Shawnee County, Kan.*, 320 F. Supp.2d 1143, 1151 (D.Kan. 2004).

[49] *Faustin v. City, County of Denver, Colorado*, 268 F.3d 942, 951 (10th Cir. 2001) (citing *Monell v. Dep't of Soc. Serv. of the City of New York*, 436 U.S. 658, 694 (1978)).

[50] *Harris v. Robinson*, 273 F.3d 927, 932 (10th Cir. 2001) (citing *Monell*, 436 U.S. at 690-94).

[51] *Watson v. City of Kansas City, Kan.*, 857 F.2d 690, 695 (10th Cir. 1988).

[52] *Smith v. Barber*, 195 F.Supp.2d 1264, 1274, n.2 (D.Kan. 2002).

Plaintiffs contend the following Unified Government policies and/or customs resulted in the constitutional deprivations alleged:

- A policy and/or custom of unnecessary and excessive speed under less than optimal traffic conditions in operating emergency response vehicles.
- A policy and/or custom requiring that an emergency response vehicle approaching a negative right-of-way intersection need only slow down and prepare to stop.
- A policy and/or custom of selecting emergency response routes using only one criteria: the most direct route.

The Court will examine whether Plaintiff has shown a material question of fact regarding the existence of each of the alleged policies and customs.

i. *Policy and/or Custom of Operating Emergency Response Vehicles Under Less Than Optimal Traffic Conditions at Unnecessary and Excessive Speeds*

Defendants assert it is neither the policy nor the custom of the Unified Government to operate emergency response vehicles under less than optimal traffic conditions at unnecessary and excessive speeds. To support their assertion, Defendants cite to General Order 96, the Unified Government's written policy regarding operation of emergency response vehicles, which spe-

cifically prohibits driving too fast for existing conditions.

Plaintiffs concede that General Order 96 on its face prohibits driving too fast under existing conditions. Plaintiffs argue, however, that the formal written policy provides no guidance regarding what constitutes excessive speed under the many different circumstances with which a driver could be confronted. Plaintiffs contend the definitive meaning of the phrase "excessive speed under the circumstances" actually is provided by policymakers, who ultimately establish the actual custom or practice of the Unified Government relative to vehicular speed in these circumstances. Plaintiffs contend it is this custom – as opposed to the formal written policy – that tacitly approves and/or explicitly endorses excessive speed under less than optimal traffic conditions.

In support of this contention, Plaintiffs submit the deposition testimony of Fire Chief DeKeyser, who denies the proposition that a speed of 50 miles per hour when Mots entered the negative right-of-way intersection at issue in this case necessarily would be inappropriate in any given situation. As Fire Chief, it is DeKeyser's responsibility to interpret and define the meaning of a department policy if such a policy comes into question. Based on the asserted conflict between the policy as written and the policy as interpreted by Fire Chief DeKeyser, and viewing the evidence in the light most favorable to Plaintiffs, the Court is persuaded that a material question of fact exists with regard to whether it is the practice and/or custom of the Unified Government to operate emergency response vehicles at unnecessary and excessive speeds under less than optimal traffic conditions.

ii. *Policy and/or Custom of Requiring that an Emergency Response Vehicle Approaching a Negative Right-of-Way Intersection Need Only Slow Down and Prepare to Stop*

Again viewing the evidence in the light most favorable to Plaintiffs, the Court accepts as true that Mots' fire truck had a red light as it approached and entered the intersection, and that Mots failed to stop the fire truck before entering this negative right-of-way intersection. Although written training materials utilized by the Unified Government instruct drivers to stop before entering a negative right-of-way intersection, Plaintiffs contend that Mots' failure to stop is consistent with the actual official policy and established custom of the Unified Government. In support of this contention, Plaintiffs cite to General Order 96, which requires that an emergency response vehicle approaching a negative right-of-way intersection only slow down and prepare to stop, as opposed to requiring the emergency vehicle to actually stop. Plaintiffs also cite to the testimony of

- Steven Jensen, the Kansas Highway Patrol Officer who provided some of the driver training to the Unified Government's fire department, including Mots, who states that the training he provided did not recommend that emergency vehicles be brought to a stop before entering a negative right-of-way intersection;
- Fire Chief DeKeyser, who stated that a driver/operator approaching a negative

right-of-way intersection should follow General Order 96, which does not require an emergency vehicle to stop; and

- Mots, who stated he does not always stop at a red light and, in fact, that he usually does not stop at a red light.

For purposes of summary judgment, the Court finds the evidence presented by Plaintiffs is sufficient for a jury to find Fire Department policy requires that an emergency response vehicle approaching a negative right-of-way intersection need only slow down and prepare to stop.

iii. *A Policy and/or Custom of Selecting Emergency Response Routes Using Only One Criteria: the Most Direct Route*

Thomas DeKeyser, Fire Chief of the Kansas City, Kansas Fire Department, instructs that although factors such as traveling patterns and congestion, rush hour and the time of day in selecting a route to travel when responding to an emergency fire call may be considered, response time is the paramount consideration in selecting a route.

Mots always travels the most direct route when responding to an emergency fire call. Mots acknowledged that buildings at an intersection can blanket or redirect siren noise, and thereby increase the potential for a collision, that a busy and congested intersection is more prone to collisions involving emergency vehicles, and that the more intersecting roadways there are at an intersection, the more predisposed the intersection is to

collisions. Nevertheless, even assuming that the features of the intersection make it more dangerous than another intersection, Mots always travels the most direct route when responding to an emergency fire call and does not change his chosen route to avoid an intersection that he believes is more hazardous.

Captain Stephen, who was Mots' supervisory captain and was seated to Mots' right at the time of the collision, would never avoid an intersection because he believed the intersection, due to congestion, traffic count, nature of signals, nature of road layout, or the presence of building structures, was more risky. To the contrary, he would still go through that intersection: "[c]losest route is what we like to go."

Simply put, the evidence presented is sufficient for a jury to find Fire Department policy and/or custom utilizes only one criteria to select emergency response routes: the most direct route.

b. Deliberate Indifference To or Tacit Approval Of Such Misconduct by Municipality's Policy making Officials After Notice to the Officials of the Particular Misconduct

To prove deliberate indifference, Plaintiffs are required to show that "a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision."[53] Inherent within this deliberate indifference

---

[53] *Bd. of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. at 411.

standard is the requirement that municipal policymaking officials are aware that the custom – or particular misconduct alleged – is regularly practiced by municipal employees. In order to determine whether prior notice existed here, the Court finds it helpful to again sets forth the following customs and practices that Plaintiffs claim resulted in the constitutional deprivations alleged:

- A policy and/or custom of unnecessary and excessive speed in the operation of emergency response vehicles under less than optimal traffic conditions.
- A policy and/or custom requiring that an emergency response vehicle approaching a negative right-of-way intersection need only slow down and prepare to stop.
- A policy and/or custom of selecting emergency response routes using only one criteria: the most direct route.

Upon review of the evidence, the Court is persuaded that Plaintiffs sufficiently have carried their burden for purposes of surviving summary judgment. More specifically, the policies and/or customs referenced by Plaintiffs derive from, or are directly sanctioned by, Fire Chief DeKeyser in his capacity as the highest policymaking official within the Kansas City, Kansas Fire Department. As a preliminary matter, DeKeyser submits that the Fire Department, in certain circumstances, would sanction as appropriate the practice of traveling at a speed of 50 miles per hour, with a posted speed limit of 30 miles per hour, through a red light at a five-way intersection obstructed by buildings.

Moreover, DeKeyser states on behalf of the Fire Department that response time is the paramount consideration in selecting a travel route to a fire emergency. DeKeyser further states that although it is the driver's responsibility to determine an appropriate travel route in responding to an emergency call, the driver's supervisory captain riding in the fire truck retains final authority regarding this decision. To that end, both Mots – as a driver – and his supervisor, Captain Stephen, always travel the most direct route when responding to an emergency fire call and are not going to change this chosen route to avoid an intersection they feel is more hazardous.

Lastly, Fire Chief DeKeyser is aware of the requirements within General Order 96 (the official policy of the Fire Department) requiring a fire truck only to slow down and prepare to stop as it travels through a negative right-of-way intersection. Fire Chief DeKeyser is also aware that driver training materials provided to Fire Department employees instruct drivers to stop at negative right-of-way intersections, even if local policy or state statute does not require stopping. Confronted with this conflict, and acknowledging it is his responsibility as the top Fire Department policymaker to interpret and define the meaning of a department policy if such a policy comes into question, Fire Chief DeKeyser requires his employees to adhere to General Order 96 and relieves them of any duty to comply with the referenced training materials.

Based on the evidence presented, the Court is persuaded that municipal policymaking officials were aware of, and took no action to stop, Fire Department employees who regularly engaged in the practice of un-

necessary and excessive speed in the operation of emergency response vehicles under less than optimal traffic conditions, who regularly complied with General Order 96 requiring only slowing down and preparing to stop upon approaching a negative right-of-way intersection, and who regularly selected emergency response routes using only one criteria: the most direct route. For this reason, the Court cannot rule out the possibility that a reasonable jury might find the municipality acted with deliberate indifference to the safety of those driving its roads.

c. Causal Connection: Were Fire Department Customs and Practices the Moving Force Behind the Unconstitutional Acts?

In addition to culpability on the part of the municipality, there must be a direct causal link between the municipal policy and the constitutional deprivation. The United States Supreme Court describes this high threshold of proof by stating that the policy must be the "moving force" behind the injury alleged.[54] Applying the threshold here, Plaintiffs must come forward with sufficient evidence from which a jury could find that Fire Department customs regarding excessive speed under less than optimal traffic conditions, only slowing and preparing to stop at negative right-of-way intersections and route selection using response time as a sole criteria, were the "moving force" behind the fatal car accident killing Becerra.

---

[54] *Monell v. Dep't of Soc. Serv. of the City of New York*, 436 U.S. 658, 694 (1978); *see, also, City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).

The Court is persuaded that Plaintiffs again have satisfied their burden. More specifically, the Court finds Plaintiffs have come forward with sufficient evidence for a jury to find that Fire Department customs and practices – to which Mots adhered – were the moving force behind the fatal car accident killing Becerra.

2. **Municipal Liability Based on Inadequate Training and/or Supervision**

"[M]unicipal liability based on a policy of inadequate training requires proof of the municipality's 'deliberate indifference' to its inhabitants – i.e., the failure to train must reflect a deliberate or conscious choice by a municipality."[55] Plaintiffs may sufficiently demonstrate deliberate indifference by establishing that "the municipality [had] actual or constructive notice that its action or failure to act [was] substantially certain to result in a constitutional violation, and it consciously or deliberately [chose] to disregard the risk of harm."[56] "In the municipal liability context, deliberate indifference is an objective standard which is satisfied if the risk is so obvious that the officer should have known of it."[57]

To support their claim of inadequate training, Plaintiffs submit professional training materials utilized by the Unified Government and compare them to official policies and established customs of the Fire Department. First, Plaintiffs note that all of these training materials consistently state in one way or another that the driver/operator of any emergency response vehicle

---

[55] *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998).

[56] *Id.*

[57] *Id.* at 1307 n.5.

should stop before entering a negative right-of-way intersection, regardless of a local policy or state statute to the contrary. In deposition testimony, Fire Chief DeKeyser readily acknowledges on behalf of the Fire Department a significant difference between the written training materials and the official policy of the Fire Department, which does not require drivers to stop at negative right-of-way intersections. Fire Chief DeKeyser instructs his drivers to follow official policy, not the training materials. Consistent with this testimony, the Fire Department's trainer – Mr. Jensen – deems the training materials incorrect, and instructs drivers they are not required to stop before entering negative right-of-way intersections.

Plaintiffs also submit written training materials utilized by the Fire Department that state response route selection should take into account avoidance of hazardous intersections, including intersections which, due to numerous intersecting roadways, high traffic congestion and building structures, predispose to collisions. Notwithstanding these materials, Fire Chief DeKeyser states on behalf of the Fire Department that regardless of potential traffic hazards, speed of response is the paramount consideration in selecting a travel route in responding to a fire emergency. Consistent with DeKeyser's charge, both Mots and his immediate supervisor, Captain Stephen, will not avoid or route around an intersection just because it may be hazardous.

The training materials recommend that fire departments establish clear speed requirements for emergency vehicle operation under varying circumstances, thereby removing operator discretion. Nevertheless, the fire department does not have any specific speed limits

for its emergency response vehicles. In his deposition, Fire Chief DeKeyser states he was unwilling to embrace the suggestion that even a speed of 50 miles per hour by Mots (with a posted speed limit of 30 miles per hour at a five-way intersection against a red light with building obstruction) would have been inappropriate. Steve Jensen, the person who provided driver training to Mots, deems it impossible to identify reasonable versus unreasonable speeds for emergency vehicle operation because speed "is the last thing you are really concerned about as the emergency vehicle operator."

With regard to inadequate supervision, Plaintiffs submit evidence demonstrating the Unified Government's failure to adequately investigate and analyze its own history of collisions and near-misses involving its emergency vehicles. Plaintiffs argue thorough investigations of all vehicular collisions are critical in order to accurately determine the causes and prevent collisions in the future. Plaintiffs submit that when the Board convenes to review a vehicular collision, the events of the meeting are not recorded or transcribed; the driver under investigation may attend the meeting, but he is not required to attend; the Board never seeks the attendance and participation at the meeting of any other fire department personnel or member of the public who may be witnesses with relevant information; and the Board often does not even obtain the related police report. Plaintiffs argue that absent thorough investigation and valid conclusions regarding prior collisions, the Unified Government is necessarily unable to use prior collisions to appropriately supervise and discipline unacceptable behavior in the past and thus prevent recurrence in the future.

In addition to these general facts, Plaintiffs also argue that Mots' immediate supervision on the night of the collision was inadequate. His supervisor was Captain Stephen, who was seated in the fire truck to his right. As the supervising officer, Stephen was responsible for ultimate approval of the route selected by his driver and the manner in which his driver operated the vehicle along the route. If Captain Stephen took issue with any aspect of his driver's operation of the vehicle, including route selection, speed or the manner in which the driver approached or intended to navigate an intersection, he was required to take charge and correct the driver's behavior. On the night in question, Stephen never said anything to Mots about his route selection, his speed or the manner in which he approached or intended to enter the intersection at Central Avenue and 18th Street. From the time the fire truck entered the intersection through to time of impact, Captain Stephen was looking down at his map book.

The evidence offered by Plaintiffs as set forth above is sufficient to demonstrate the Fire Chief DeKeyser, acting on behalf of the Unified Government, had notice of the alleged deficiencies in training and supervision of Fire Department employees and, despite the notice, consciously chose to disregard the risk of harm that could be caused by these potential defects in training and supervision. This Court cannot rule out the possibility that a reasonable jury might find from this evidence that the Unified Government consciously and deliberately excluded information in the course of training and supervising its employees that it knew could safeguard the citizens driving on its roads and protect them from danger. A failure to train and supervise firefighters

on ways to avoid such tragic events as the one that happened here certainly could result in a finding by the trier of fact that the Unified Government exhibited "deliberate indifference" under these circumstances.

Finally, the Court finds Plaintiffs present sufficient evidence for a jury to find that the fatal car accident killing Becerra occurred because of Fire Department customs and practices consciously permitting insufficient training and supervision. In sum, the evidence presented creates triable issues regarding the adequacy of the Unified Government's emergency vehicle operator training, and its causal connection to Mots' operation of the fire truck on the night in question.

IV. Conclusion

For the reasons stated above, Defendants' Motion for Summary Judgment

(1) is granted with respect to

- the claims of Hector Becerra under the Kansas Wrongful Death Act;
- the claims of Sabrina and Hector Becerra (in his individual capacity) under the Kansas statute for survival of claims; and
- the claims of Sabrina Becerra and Hector Becerra (in his individual capacity) under 42 U.S.C. § 1983; and

(2) is denied in all other respects.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 30th day of September 2004.

s/ David J. Waxse

David J. Waxse
United States Magistrate Judge

cc: All counsel and *pro se* parties

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANGELA PEREZ AND HECTOR BECERRA, Plaintiffs-Appellees,

v.

UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/KANSAS CITY, KANSAS; KANSAS CITY, KANSAS FIRE DEPARTMENT, Defendants

and

ANTHONY W. MOTS, individually and in his official capacity, Kansas City, Kansas Fire Department, Defendant-Appellant.

No. 04-3397

ORDER
FILED January 24, 2006

Before **LUCERO, BRORBY**, and **HARTZ**, Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

(2)

No. 05-1356

Supreme Court, U.S.
FILED
MAY 26 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ANGELA PEREZ, et al.,

Petitioners,

v.

UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/KANSAS CITY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

MICHAEL W. SHUNK
Counsel of Record
LONG, LUDER & GORDON, P.A.
9401 Indian Creek Pkwy., Suite 800
Overland Park, KS 66210
(913) 491-9300

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

RESPONDENTS' STATEMENT OF THE FACTS 1

REASONS FOR DENYING THE PETITION 2

I. PETITION FAILS TO SATISFY THE CRITERIA FOR GRANTING A PETITION FOR WRIT OF CERTIORARI 2

A. The court of appeals' decision is consistent with the Supreme Court's holding in *County of Sacramento v. Lewis* 2

B. The court of appeals' decision is consistent with every federal court of appeals that has decided the issue since *Lewis* 4

II. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF CULPABILITY UNDER THE FACTS 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Bublitz v. Cottey, 327 F.3d 485 (7th Cir. 2003) 6

Carter v. Simpson, 328 F.3d 948 (7th Cir. 2003) 4

Collins v. Harker Heights, 503 U.S. 115 (1992) 5

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 2, 3, 4, 5, 6

Daniels v. Williams, 474 U.S. 327 (1986) 5

Dillon v. Brown County, Nebraska, 360 (8th Cir. 2004) 4

Hill v. Shobe, 93 F.3d 418 (7th Cir. 1996) 5

Perez v. Unified Government of Wyandotte County, 432 F.3d 1163 (10th Cir. 2005) 3, 4

Terrell v. Larson, 396 F.3d 975 (8th Cir. 2004) 4

STATUTES

42 U.S.C. § 1983 5

RESPONDENTS' STATEMENT OF THE FACTS

At the time of the accident, firefighter Anthony Mots was responding to an emergency fire alarm. He had activated emergency lights and sirens, and he also sounded the air horn as he approached the intersection. He did all of this to warn other motorists of his approach and to avoid a possible collision. Mots slowed the fire truck as he approached the intersection. Mots looked for traffic at the intersection and approaching the intersection to determine if it was safe to proceed through the intersection. Mots did not see any vehicles entering the intersection, and the path through the intersection was clear at the time he proceeded into the intersection. The speed limit on the street Mots was traveling at the time of the accident was 30 miles per hour. The accident reconstructionist designated to testify by the plaintiffs estimates the speed of the fire truck at the time of impact to be 23-24 miles per hour. The accident reconstructionist designated to testify by the defendants estimates the speed of the fire truck to be approximately 15 miles per hour. Mots did not see the Becerra vehicle until a brief moment before the impact.

As a point of clarification, the color of the traffic light has always been a disputed question of fact. Mots has testified unequivocally that the light had turned green as the fire truck proceeded into the intersection. The interlocutory appeal below was taken on the denial of the defendants' motion for summary judgment alleging qualified immunity. For purposes of ruling on a motion for summary judgment, the trial court is required to consider all genuine issues of material fact in the light most favorable to the non-moving party. For that purpose only, it has been assumed on appeal that the light was red when the

fire truck entered the intersection. The color of the light is a disputed issue of fact.

Regardless, even assuming the light was red, the applicable state traffic law permits the operator of an authorized emergency response vehicle to enter an intersection against a red light.

In their statement of facts, the petitioners use unattributed quotes, for phrases such as "hit his accelerator" and "barreling at full force." As a matter of clarification, these are not statements of Mots. Rather, they are the statements of a witness who observed the fire truck approaching from behind his vehicle, which was stopped at the intersection. The speed estimates of 40 miles per hour to 30 miles per hour are opinions of the same lay witness.

REASONS FOR DENYING THE PETITION

I. PETITIONERS FAIL TO SATISFY THE CRITERIA FOR GRANTING A PETITION FOR WRIT OF CERTIORARI.

A. The court of appeals' decision is consistent with the Supreme Court's holding in *County of Sacramento v. Lewis.*

In *County of Sacramento v. Lewis,* 523 U.S. 833 (1998), this Court held that "high speed chases with no intent to harm suspects physically or worsen their legal plight do not give rise to liability under the Fourteenth Amendment." *Id.* at 854. Likewise, the court of appeals below held that a fire truck responding to an emergency fire alarm with no intent to harm innocent bystanders does not give rise to liability under the Fourteenth

Amendment. *Perez v. Unified Government of Wyandotte County,* 432 F.3d 1163, 1168 (10th Cir. 2005). The court of appeals' ruling did not conflict in any way with the holding in *Lewis.* To the contrary, it is a natural extension of the *Lewis* holding.

The petitioners are preoccupied with the discussion of "deliberate indifference" in the *Lewis* case. They argue a reviewing court must delve into the facts of every emergency response case to determine if deliberation was practical, and if so, then the deliberate indifference standard should apply instead of the "purpose to cause harm" standard. They argue for this reason, the decision of the court of appeals below is in conflict with *Lewis.*

The petitioners refuse to acknowledge the realistic approach taken by this Court in *Lewis,* and by every federal court of appeals that has decided this issue since *Lewis*: By their very nature, certain categories of state action do not afford the opportunity for deliberate indifference. For that reason, those cases are decided under the alternative "intent to harm" standard of culpability. Consistent with *Lewis,* an emergency response case is a state action within that category.

It is irrelevant that the state actor had the opportunity to consider all of the details involving the operation of the vehicle. The operation of a vehicle is always the result of conscious decisions, even in the high-speed chase context. For example, the police office in a high-speed chase always has the option of slowing, stopping or waiting for red lights. Instead, he or she *deliberately* drives fast, and *deliberately* proceeds against red lights. The petitioners distort the meaning of deliberation as that term is applied by the courts. The question is not whether

the state actor deliberates on the details of his conduct; it is whether the state actor deliberates on the harm that results from that conduct. If the state actor has the opportunity to pause and reflect on the fact that his conduct is harmful to another, but persists in the conduct, it can be said that the state actor is deliberately indifferent to the rights of the victim. In the context of an emergency response collision, on the other hand, the state actor is not aware of harm to another until an instant before the collision, when there is no opportunity to deliberate on the resulting harm.

The decision of the court of appeals below is a consistent extension of the holding in *County of Sacramento v. Lewis,* and does not conflict with that decision in any significant way.

B. The court of appeals' decision is consistent with every federal court of appeals that has decided the issue since *Lewis.*

Four federal courts of appeal (including the Tenth Circuit below) have decided this issue since *Lewis. See Carter v. Simpson,* 328 F.3d 948 (7th Cir. 2003), *Dillon v. Brown County Nebraska,* 380 F.3d 360 (8th Cir. 2004), *Terrell v. Larson,* 396 F.3d 975 (8th Cir. 2004), and *Perez,* 432 F.3d 1163 (10th Cir. 2005). All four have held that an emergency responder who is involved in a collision could not be liable under the Fourteenth Amendment absent some purpose to cause harm. *Carter,* 328 F.3d at 952, *Dillon,* 380 F.3d at 363-364, *Terrell,* 396 F.3d at 980, and *Perez,* 432 F.3d at 1168. Thus, there is no split among the circuits.

The petitioners argue there is a split among the circuits because of subtle and abstract differences in the facts and rationale of these cases. This misses the point. These courts all applied the same rule to the same category of state action, and arrived at the same result. The decisions of the circuit courts are consistent on this issue.

II. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF CULPABILITY UNDER THE FACTS.

"Only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *County of Sacramento v. Lewis,* 523 U.S. at 846 (citing *Collins v. Harker Heights,* 503 U.S. 115, 126 (1992)). By their very nature, automobile accidents involving emergency response vehicles simply do not implicate the type of egregious official conduct necessary to support a due process claim. "To hold otherwise would diminish the civil rights statutes to the equivalent of a body of general federal tort law, and open the courts to a flood of litigation which the framers of Section 1983 clearly did not intend." *Hill v. Shobe,* 93 F.3d 418 (7th Cir. 1996) (citing *Daniels v. Williams,* 474 U.S. 327, 332). If the facts of this case present a viable Section 1983 claim, then *any* automobile accident involving a state actor will give rise to a civil rights claim. Section 1983 was not intended as a vehicle of recovery for those injured in automobile accidents, let alone accidents involving emergency response vehicles.

Regardless of whether the Court applies the "intent to harm" standard for culpability or the "deliberate indifference" standard, Mots could not be liable under 42 U.S.C. § 1983 because the record of this case contains no evidence that could ever be considered "shocking to the conscience."

To rise to the level of a constitutional violation, a deliberately indifferent act must be one which is conscious-shocking – the Supreme Court has acknowledged that not every deliberately indifferent action will rise to the "constitutionally shocking level." *Bublitz v. Cottey,* 327 F.3d 485 (7th Cir. 2003) (citing *Lewis,* 523 U.S. at 852). Here, the petitioners have failed to demonstrate any facts that could be shocking to the conscience.

The petitioners argue the decision below deprives them of "their day in court under 42 U.S.C. §1983." The petitioners are not, however, deprived of their day in court under state tort law, which is the proper setting for a claim such as this one involving a collision that occurs during an emergency response.

CONCLUSION

Because the court of appeals decided this case in a manner that is consistent not only with this Court's previous holding in *County of Sacramento v. Lewis,* but also with every other federal court of appeals that has decided the issue, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL W. SHUNK
Counsel of Record
LONG, LUDER & GORDON, P.A.
9401 Indian Creek Pkwy., Suite 800
Overland Park, KS 66210
(913) 491-9300

Attorney for Respondents